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Supreme Court of the United States

October Term, 1979

No. 79-1664

ROBERT JOSEPH RENNERT,
Petitioner,

vs.

JACK RAYMOND DUCKWORTH, Warden
Indiana State Prison,
Respondent

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Seventh Circuit

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ROBERT JOSEPH RENNERT,
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vs.

JACK RAYMOND DUCKWORTH, Warden
Indiana State Prison,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Seventh Circuit

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on February 1, 1980, affirming the denial of petitioner's Petition for a Writ of Habeas Corpus by the United States District Court for the Northern District of Indiana, South Bend Division.

CITATIONS TO OPINIONS BELOW

The Indiana Supreme Court affirmed petitioner's state court conviction in an opinion *sub nom. Rennert v. State,* reported at 263 Ind. 274, 329 N.E.2d 595 (1975) (Appendix p. A1).

The district court entered judgment denying the petition for a writ of habeas corpus on January 31, 1979, with memorandum and order, printed in the appendix hereto, p. A11.

The opinion of the Seventh Circuit Court of Appeals, printed in the appendix hereto, p. A23 is dated February 1, 1980, and was an unpublished order, "not to be cited per Circuit Rule 35."

JURISDICTION

The judgment of the Court of Appeals was entered in the subject cause February 1, 1980 (Appendix p. A22). The jurisdiction of this Court is invoked under Title 28, U.S.C. §1254(1).

QUESTIONS PRESENTED

I. Where the presence of a parent and an attorney for a target witness before a state grand jury was in violation of Indiana statutory law, should the federal *per se* rule of prejudice be applied to the state by virtue of the due process and equal protection clauses of the fourteenth amendment to the United States Constitution, thereby voiding the indictment or, in the alternative, where the presence of such unauthorized persons strongly infers prejudice, is there a due process and equal protection violation requiring the voiding of the indictment?

II. Where, in a state criminal prosecution for murder, the County Sheriff confiscates the outgoing mail of the petitioner, then an inmate awaiting trial, which mail includes incriminating statements, and the mail is submitted into evidence over objections based on the ninth, fifth and fourteenth amendments to the United States Constitution, which are extended to first and fourth amendment grounds on appeal to the State Supreme Court, may the petitioner raise his objection by way of federal habeas corpus based on the first amendment as incorporated as applied to the states by the fourteenth amendment and, if so, does the mail, without further evidentiary support, justify a finding that the petitioner had no expectation of privacy?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are the first and fourteenth amendments to the Constitution of the United States. The statutory provisions involved are Burns, Indiana Statutes, 35-1-16-1, 35-1-15-23, and 35-1-15-10. Also involved is Rule 6(d) Federal Rules of Criminal Procedure. The foregoing constitutional and statutory provisions are presented in the appendix pp. A29-A30.

STATEMENT OF THE CASE

Petitioner was indicted and found guilty in an Indiana state court of the murder of two persons and is presently serving a life sentence concurrent with a fifteen (15) to twenty-five (25) year term at the Indiana State Prison, of which respondent is warden.

Prior to trial, he moved to abate and dismiss the indictment on the ground that unauthorized persons appeared before the county grand jury which indicted him. Both federal and state cases in support of his position were submitted by brief to the state trial judge (R. 18). This motion was denied by the state trial judge.

During trial, the state presented a letter mailed by petitioner while incarcerated in the County Jail awaiting trial. The letter contained incriminating statements. Objections were made at trial to its admission based on the ninth, fourteenth and fifth amendments to the United States Constitution. The objection was overruled and the letter was received.

After conviction, these alleged errors were presented to the Indiana Supreme Court, at which time the petitioner also argued, with regard to the letter issue, a violation of his first and fourth amendment rights. The judgment was affirmed by the Indiana Supreme Court on June 19, 1975. *Rennert v. State*, 329 N.E.2d 595 (Appendix p. A1).

On October 30, 1978, petitioner filed a Petition for a Writ of Habeas Corpus in the United States District Court for the Northern District of Indiana, South Bend Division. On January 31, 1979 it was denied. The opinion of the District Judge is contained at p. A11 of the appendix herein.

Thereafter, a Notice of Appeal was filed in the District Court together with a Request for a Certificate of Probable Cause. The request was denied by the District Judge. Thereupon, petitioner filed a Motion for a Certificate of Probable Cause in the Court of Appeals, which motion was granted by Circuit Judge Sprecher on June 28, 1979.

The Court of Appeals for the Seventh Circuit affirmed the District Court on February 1, 1980. The unpublished opinion is carried at p. A23 of the appendix.

STATEMENT OF FACTS

In January of 1973, the Allen County, Indiana Grand Jury was investigating the double homicide of a Roger Hudson and Daniel Wolfe. The inquiry focused on two suspects, the Petitioner and one Jack James. James was called as a witness before the Grand Jury. His attorney, a Mr. Lewandowski, and both of James' parents were allowed to enter the Grand Jury room and remain throughout his examination. The relevant portions of the transcript concerning this matter are pages 82 and 119 to 122. Mr. Lewandowski was permitted extensive cross-examination of his own client. The prosecutor then asked James' parents for their remarks, after commenting on this "unusual" aspect of the proceedings. After a discussion with Mr. Lewandowski, James' parents declined any comment.

On January 9, 1973, while in custody at the Allen County Jail prior to Grand Jury action, the Petitioner wrote a letter addressed to an individual connected with his home town newspaper in Ohio. The letter was written on paper purchased from the jail commissary and had certain jail regulations printed at the bottom, including *inter alia*:

> All inmates' mail is Inspected by Jail Personnel for contraband. * * *
>
> All correspondence must be in English, otherwise, letters will not be delivered. (A copy of the January 9, 1973 letter is found at Appendix, p. A18).

REASONS FOR GRANTING THE WRIT

Both issues raised in this petition are federal questions of substance not theretofore determined by this Court. Furthermore, the federal courts which have ruled herein have decided important questions of federal law which have not been, but should be, settled by this Court.

SUMMARY OF ARGUMENT

The Grand Jury Issue

Some states have adopted a *per se* rule of prejudice where unauthorized persons have appeared before a State Grand Jury. See argument, at p. 7 *infra*. Federal courts have adopted such a *per se* rule. See argument at p. 8 *infra*. The question presented in this case is whether this Court should adopt a *per se* rule for both state and federal courts, thereby holding that a violation of grand jury secrecy by the attendance of unauthorized persons, violates federal constitutional principles of due process and equal protection.

The Letter Issue

The ultimate question here is whether a first amendment claim to privacy in personal correspondence is justiciable in federal habeas corpus, a novel question. If so, we must determine whether the lower courts were in error in concluding a lack of expectation of privacy on such a skimpy record as has thus far been presented.

Furthermore, a question arises as to the relationship between first amendment exclusion claims and the *Stone v. Powell* rule, which appears to be limited to fourth amendment search and seizure claims. This is an equally novel and meritorious question which deserves this Court's consideration.

ARGUMENT

The Grand Jury Issue

Numerous states have adopted rules that find prejudice *per se* from the appearance before a grand jury of unauthorized persons. See, for example, *Rudd v. State ex rel. Christian*, 310 So.2d 295, 298-99 (Fla. 1975); *State v. Hansen*, 215 N.W.2d 249, 259 (Iowa 1974); *People v. Minet*, 296 N.Y. 315, 73 N.E.2d 529 (1947); and *Commonwealth v. Harris*, 121 N.E. 409 (Mass. 1919). In the last of these cases, the Massachusetts Supreme Judicial Court rests its rule on basic due process theories:

> It is manifest an examination of witnesses by the grand jury in the presence of others, witnesses, bystanders or judges, necessarily and inevitably subjects the accused to a public trial without right to testify in his own behalf or to be represented by counsel or attorney. It is equally plain such procedure destroys the force and vital principle of the oath which enjoins the grand jury to keep secret "the commonwealth's counsel, your fellow's and your own." The principle of secrecy is not impaired by permitting a grand jury man, after the finding of an indictment, to testify that a witness on behalf of the prosecution testified differently on his examination before them from the testimony given by him before the jury of trial. Commonwealth v. Mead, 12 Gray 167, 71 Am. Dec. 741.

Since the failure of the judges in 1681, Earl of Shaftesbury's Case, supra to compel the grand jury by an open hearing to find a bill or indictment, the investigations have been invariably made in privacy. In England "the grand jury sit by themselves and hear the witnesses one at a time, no one else being present

except the solicitor for the prosecutor if he is admitted." 1 Stephen's History of the Criminal Law of England, 274.

Obviously Indiana, from a reading of the Rennert case, appendix A1, has no such rule, but requires a showing of prejudice.

The federal courts have adopted a *per se* rule in federal criminal prosecutions. This rule springs from Rule 6(d), Federal Rules of Criminal Procedure, which authorizes only attorneys for the government, the witness under examination, an interpreter of a witness, and a court reporter to be present before the federal grand jury.

Perhaps the best statement of the federal *per se* rule is contained in *U. S. v. Kazonis* (D.C. Mass. 1975), 391 F. Supp. 804, *aff'd*, 530 F.2d 962, *cert. den.* 429 U.S. 826.

There the Court cited two reasons for the *per se* rule; first, the requirement that the proceedings be private and second, that the witnesses and grand jurors sitting without the protection of a presiding justice, be free from the risk of intimidation attendant on the presence of others.

The possibility of undue influence was pointed out as a reason for the rule in *U. S. v. Isaacs* (D.C. Ill. 1972), 347 F. Supp. 743. The court cited *U. S. v. Edgerton*, 80 F. 374 (D.C. Mont. 1897) as promulgating a *per se* rule. The *Edgerton* court said that if the presence of unauthorized persons before the grand jury is excused, it will be impossible to set the bounds to prevent abuse. Also cited was *U. S. v. Carper*, 116 F. Supp. 817 (D.C. D.C. 1953) where deputies guarding witnesses were present before the grand jury. The *Carper* court felt that the presence of such persons could well have influenced the witness' testimony. The *Carper* court also noted the virtual impossibility of an accused ever showing prejudice. The

Isaacs court concludes that the undue influence factor is the basis for the *per se* rule. It finally cites two cases as illustrating this principle. The first is *U. S. v. Borys*, 169 F. Supp. 366 (D.C. Alaska, 1959) where the mother of a seven year old witness was permitted entry. The other case was *U. S. v. Bowdach*, 324 F. Supp. 123 (S.D. Fla. 1971) where an FBI agent was in the grand jury to operate a tape machine to refresh a witness' recollection. The *Bowdach* court said that Rule 6(d) lays down a hard and fast rule which allows for no exceptions.

In *U. S. v. Phillips Petroleum Company*, 435 F. Supp. 610 (N.D. Okla. 1977) two unauthorized persons were present. The court held that "the slightest intrusion of an unauthorized person into a grand jury proceeding voids the indictment even absent a showing of prejudice." The Court, as do other courts, cites as precedent the seminal case of *Latham v. U. S.*, 226 F. 420 (5th Cir. 1915), a decision pre-dating the federal rules, which decision adopted a *per se* rule.

The *Latham* case adopts the *per se* rule on the basis of basic and fundamental concepts of justice. The case speaks for itself:

> The right of the citizen to an investigation by a grand jury pursuant to the law of the land is invaded by the participation of an unauthorized person in such proceedings, be that participation great or small. It is not necessary that participation should be corrupt, or that unfair means were used. If the person participating was unauthorized, it was unlawful. And this would be an unlawful invasion of the right of the citizen, and unless this unlawful invasion is rectified by a proper tribunal at the instance of the citizen, it becomes a justified illegality; and in the words of Judge Hough:

> 'A justified illegality, however trivial of itself, is of the highest importance.'

Latham is also cited in *U. S. v. Braniff Airways, Inc.*, 428 F. Supp. 579, 582 (W.D. Tex. 1977). The Court goes on to say that "the very presence of an unauthorized person is condemned and is held ground *per se* for abating the indictment without proof of actual prejudice."

We believe this reasoning has equal applicability both to federal and state grand juries, fully recognizing the rule that no state must provide a grand jury. *Hurtado v. Calif.*, 110 U.S. 516 (1884). Once a state elects to prosecute through the utilization of a grand jury, the resulting procedures must adhere to basic due process and equal protection principles. *Peters v. Kiff*, 407 U.S. 493 (1972). In *Wood v. Georgia*, 370 U.S. 375, Chief Justice Warren said, at p. 390:

> Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.

Basic fairness in the racial selection of a state grand jury has raised that aspect of state grand jury proceedings to a federal constitutional level. *Alexander v. Louisiana*, 405 U.S. 625 (1972), *Peters v. Kiff, supra*. We concede, as this Court pointed out, in *Alexander*, that the federal concepts of a grand jury that are binding on federal courts under the fifth amendment, are not obligations for the states, citing *Hurtado v. California, supra*, at 538. But

obviously, as reflected in both *Alexander* and *Peters*, questions going to basic due process and equal protection concepts, are protected when violated in a state grand jury setting.

As pointed out in the beginning of this section, this Court has never been called upon to rule on whether the secrecy rules basic to all grand juries, require a *per se* rule of prejudice when unauthorized persons appear before state grand juries.

The policy arguments behind the federal *per se* rule are based on concepts of basic fairness and justice and recognize the inherent prejudice that can occur when persons with varying axes to grind appear without authority before a grand jury.

In the case at bar there were two suspects. In fact, the record reveals that James, the other suspect, rather than the petitioner, was originally the prime suspect. His appearance before the grand jury had a halo effect. Present with him were his parents, whose presence could only suggest to the grand jurors an imprimatur upon his testimony that might otherwise be lacking with a man otherwise so intimately involved in the crimes. Further halo effects were generated when his own attorney was given the extraordinary right not only to appear but to question him at length.

Even those states that lack a *per se* rule permit the voiding of indictments where prejudice is shown. Yet it is virtually impossible to show prejudice, *U. S. v. Carper, supra*, p. 8. Only a nation-wide, uniform *per se* rule will protect grand jury suspects from the various dangers that are inherently present when unauthorized persons appear before such secret bodies.

Intercepted Letter

There are a number of substantial issues discussed by the District Court and the Court of Appeals dealing with the rules concerning interception of prisoner's mail and expectations of privacy. However, before these issues can be reached there are certain procedural questions which have troubled the lower courts. As indicated in the section entitled "Statement of the Case," the letter issue first came up at trial when a deputy sheriff testified to his interception of the letter in question. When the State moved the admission into evidence of the letter, the petitioner's counsel objected on grounds of the "Ninth, Fourteenth and Fifth Amendments to the Constitution of the United States." The objection was overruled and the letter was admitted. It would appear from a reading of the four corners of the record that the letter took defense counsel by surprise.

When direct appeal was taken to the Indiana Supreme Court, petitioner also argued the first amendment and claimed an illegal seizure although not specifically mentioning the fourth amendment in his motion to correct errors. The Indiana Supreme Court seized upon this variance and refused to consider the first amendment claim since it was not raised below (329 N.E.2d 595, 598-9, Appendix p. A1).

When this issue came before the District Judge, near the end of his opinion, in discussing the first amendment issue he maintains that this is an issue to be treated in a civil action for violation of civil rights rather than in federal habeas corpus (Appendix p. A17). We assume he meant a damage action.

This is also the view of the Court of Appeals as indicated in the following from its opinion:

> The mail rights of inmates and the distinctions between mail restrictions on pretrial detainees and on those who have already been convicted are beside the point in this habeas corpus proceeding. We are concerned only with constitutionally unlawful imprisonment and not with the redress of possible civil rights violations.

This brings us to two new questions. First, was there a "full and fair" opportunity to litigate the fourth amendment issue in the State court and, second, if so, is there a different standard at the federal habeas corpus level for review of first amendment claims than that foreclosed to fourth amendment charges by *Stone v. Powell*, 428 U.S. 465 (1976). Furthermore, can first amendment issues be used to exclude evidence?

Stone requires as a prerequisite to raising fourth amendment claims in federal habeas corpus, a lack of full and fair hearing at the state level. As previously indicated, it would appear that the incriminating letter came as a complete surprise at trial; accordingly, there was no pretrial hearing, evidentiary or otherwise, to suppress this evidence on any ground. When confronted with the state's new evidence and its motion to admit, defense counsel hurriedly tossed up three appropriate amendments, ninth, fourteenth and fifth, in that order. His objection was summarily denied. It seems likely that even had he said "fourth" it would likewise have been denied.

Counsel submits that this is hardly the type of opportunity for a full and fair hearing as contemplated by *Stone* or by 28 U.S. Code §2254(d). *Stone* clearly relies for its "full and fair hearing" language on 28 U.S. Code 2254(d). A review of that statute indicates that a number of the elements therein contained are missing from the case at bar.

2254(d) requires, as a prerequisite to federal habeas corpus for state prisoners either:

> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> . . . .
>
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
>
> (7) that the applicant was otherwise denied due process of law in the State court proceeding.

and three other sub-sections not pertinent herein. But the five sub-sections quoted above are applicable to the case at bar. Petitioner's interest in sending the letter, assumed by both lower federal courts to be a letter to the editor was never "adequately developed", relegating reviewing courts to guesswork.

The Indiana Supreme Court, although discussing petitioner's fourth amendment argument, nevertheless ruled that it would not be considered on appeal since it had not been raised below or in the motion to correct errors.

Petitioner notes that in his motion to correct errors, in the Indiana Supreme Court, he did raise an illegal seizure although not specifically mentioning the fourth amendment. The Indiana Supreme Court's rigid refusal to consider the fourth amendment issue, despite petitioner's claim of an illegal search, is also not the kind of full and fair hearing envisioned by *Stone*.

Assuming, *arguendo*, that there was a full and fair opportunity for hearing of petitioner's fourth amendment claim at the state level, petitioner still contends that he should not be foreclosed from federal habeas review, since his claim is based on first amendment grounds.

The Courts have already carved out certain exceptions to the *Stone v. Powell* rule. In *Rose v. Mitchell*, ... U.S. ....., 99 S. Ct. 2993, this Court held that the *Stone* doctrine did not foreclose a federal court in a habeas case from considering discrimination in the selection of a grand jury. In his discussion of this issue, Justice Blackmun said (at 99 S. Ct. 3002):

> In *Stone v. Powell*, however, the Court carefully limited the reach of its opinion. It stressed that its decision to limit review as 'not concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally.' 428 U.S. at 495 n. 37, 96 S.Ct., at 3052-3053 (emphasis in original). Rather, the Court made it clear that it was confining its ruling to cases involving the judicially created exclusionary rule, which had minimal utility when applied in a habeas corpus proceeding. 'In sum,' the Court concluded, it was holding 'only that a federal court need not apply the exclusionary rule on habeas review of a Fourth Amendment claim absent a showing that the state prisoner was denied an opportunity for a full and fair litigation of that claim at trial and on direct review.' *Ibid.*

Likewise, the Seventh Circuit has previously held that *Stone* must be limited to fourth amendment claims and not extended to claims arising out of other amendments. *White v. Finkbeiner*, 570 F.2d 194, 200 and n. 2 (1978); *U. S. ex rel. Henne v. Fike*, 563 F.2d 809 (1977), *cert. den.* 434 U.S. 1072 (1978).

Petitioner contends that *Stone v. Powell* is limited by its own language to fourth amendment claims. Petitioner's claim in federal habeas corpus is based on the first amendment. He tried to argue this at the Indiana Supreme Court level, but was foreclosed from doing so on the ground that he had not raised the first amendment claim at the trial court level.

The District Court and the Court of Appeals both felt that a first amendment claim was not cognizable in federal habeas corpus, but was limited to a damage action. One of the reasons we are seeking review by this Court is to establish that first amendment claims are not limited to actions for damages under the Civil Rights Act. In support of this position we point out that first amendment claims in and of themselves do justify the exclusion of evidence absent a fourth amendment basis. One area where this has been recognized is the area of obscenity litigation. In *U. S. v. Manarite,* 314 F. Supp. 607 (D.C. S.D. N.Y. 1970) the Court recognized that "The requirement of an adversary hearing prior to seizing allegedly obscene material is completely derived from the First Amendment's right of free speech," although the remedy is return of the seized material rather than suppression. 314 F. Supp. 607, 610. Although this is only a District Court opinion, it does give expression to the view espoused by petitioner, that is, that the first amendment can be the sole basis for the return of seized property even absent a fourth amendment claim, and therefore, that this petitioner should not be barred at the federal habeas level from pursuing this issue due to *Stone v. Powell* considerations.

CONCLUSION

This case presents the Court with a signal opportunity to give plenary consideration to an aspect of grand jury practice that must have major ramifications. By elevating the *per se* rule of the federal courts to all courts in the nation, this Court will guarantee the kind of due process and equal protection to the subjects of grand jury inquiry already enjoyed at the federal level.

With regard to the letter issue, petitioner believes that all of the lower courts which have considered the issue have avoided the merits of the controversy through misapplied concepts of waiver. By recognizing that petitioner has not waived his first amendment rights, this aspect of the case can be remanded to the lower courts for the purpose of plenary consideration of the privacy question already raised and, if necessary, with the requirement that further evidence be developed to determine the petitioner's expectation of privacy.

For these reasons, petitioner urges this Court to grant the petition for a writ of certiorari, so that his conviction and indictment may be reviewed and these important constitutional questions considered.

Respectfully submitted,

HARLAND M. BRITZ
Attorney for Petitioner

APPENDIX

OPINION OF THE SUPREME COURT OF INDIANA

(Dated June 19, 1975)

No. 674S128

SUPREME COURT OF INDIANA

ROBERT JOSEPH RENNERT, *Appellant*
(*Defendant Below*),

v.

STATE OF INDIANA, *Appellee*
(*Plaintiff Below*).

Defendant was convicted in the Allen Circuit Court, Robert L. Hines, Special Judge, of murder in the first degree and murder in the second degree and he appealed. The Supreme Court, Hunter, J., held that where defendant was not prejudiced by presence of another suspect's atttorney and parents in grand jury room when the suspect was testifying, trial court properly overruled his motion to dismiss and his plea in abatement; that admission into evidence of letter which had been written by defendant while in jail and which had been seized by jail officials was proper; that evidence sustained finding that defendant premeditated one of the murders; and that instruction on malice was proper.

Affirmed.

DeBruler, *J.*, concurred in the result.

HUNTER, *Justice.*

Appellant Robert Joseph Rennert was indicted by the grand jury of Allen County which charged him with first degree murder in the death of Roger D. Hudson and second degree murder in the death of Daniel L. Wolfe. Appellant pleaded not guilty by reason of insanity. Jury trial resulted in verdicts of guilty as charged. Appellant was then sentenced to life imprisonment on conviction of first degree murder, and imprisonment for fifteen to twenty-five years on conviction of second degree murder. From the overruling of his motion to correct errors, appellant brings this appeal, presenting four issues for our determination.

I.

Appellant's first assignment of error is the trial court's denial of his motion to dismiss and plea in abatement through which he sought to strike down the grand jury indictment "for the reason that there were unauthorized persons in the Grand Jury Room during the taking of testimony." When Jack James, an eighteen year old suspect in the case, appeared before the grand jury, he was accompanied by counsel and his parents. The record contains a stipulation that the parents "took no part in the proceedings," but James' attorney cross-examined him.

The law regarding the presence in the grand jury room of those unauthorized by statute, see IC 1971, 35-1-15-10, Ind.Ann. Stat. § 9-810 (Burns Supp.1974) [Clerk-Stenographer], IC 1971, 35-1-15-23, Ind. Ann.Stat. § 9-826 (Burns 1956 Repl.) [Prosecutor], was set forth by this Court in *State v. Bates* (1897), 148 Ind. 610, 612-13, 48 N.E. 2, 3:

> "It is the rule that the presence of a stranger in the grand jury room during the investigation of a

> criminal charge is not sufficient to abate an indictment, unless it appears that the person indicted was thereby injured in his substantial rights. Shattuck v. State, 11 Ind. 473; Courtney v. State, 5 Ind.App. 356, 32 N.E. 335; State v. Clough, 49 Me. 573, 576; State v. Kimball, 29 Iowa 267; Bennett v. State, 62 Ark. 516, 535, 36 S.W. 947.
>
> "In State v. Clough [*supra*], 49 Me., on page 576, the court said: 'The mere fact that a stranger was present when an indictment was found, would not render it void. Though obviously proper, and highly important, that the proceedings of a grand jury should be in secret, one who is indicted cannot take any advantage of it if they are not. Shattuck v. State, 11 Ind. 473. The secrecy is not required for his benefit, but otherwise. "One reason may to be prevent the escape of the party, should he know that proceedings were intrain against him; and another may be to secure freedom of deliberation and opinion among the grand jurors, which would be impaired if the part taken by each might be known to the accused." 1 Greenl.Ev., section 252.' Nor will any indictment be set aside on the ground of informalities or irregularities, when it is not shown that the defendant has been prejudiced in his substantial rights."

Unable to demonstrate actual prejudice flowing from the presence of the outsiders, appellant urges us to adopt a *per se* rule modeled after the one utilized in the federal system of presuming prejudice when unauthorized persons appear before the grand jury. We decline to do so. The rule of *Bates* requiring proof of prejudice by an appellant collaterally attacking his conviction preserves all due process rights of the individual while protecting the interests of society in maintaining convictions justly secured.

Moreover, the rule requiring proof of prejudice in attacking grand jury proceedings has been a workable one. *See e.g., Jaudon v. State* (1970), 255 Ind. 114, 262 N.E.2d 851. In the absence of any prejudice to the appellant, there was no error in the overruling of his motion to dismiss and his plea in abatement.

II.

Appellant challenges the overruling of his objection to the admission of State's Exhibit No. 37. That exhibit was a letter, written by appellant while in jail, and addressed to one Frank Craig, c/o Defiance Crescent News, Defiance, Ohio. Apparently intended to be published as a letter to the editor, it bears the saluation, "Dear Society." The letter recounts a homosexual attack upon the appellant when he was a youth and continues by describing a more recent molestation when the appellant was "too drugged to fight." In an attempt to "escape the thought of what happened," appellant took some "acid." The drugs backfired, however, and appellant killed his molester (Hudson) and another man who was present. The letter then concluded with a plea not to take drugs. Counsel's objection at trial to the admission of the letter reads:

> MR. FINK: "Your Honor, at this time the defense would object to the introduction of State's Exhibit 37 on these following grounds, that the obtaining of the document in question, the exhibit in question, I think is in violation of certain Constitutional rights of this defendant; namely, the Ninth, Fourteenth and Fifth Amendments to the Constitution of the United States."

Appellant's motion to correct errors sought correction:

> "For an uncorrected error of law occurring in the trial proceedings in that the trial court, over objection, admitted into evidence State's Exhibit No. 37, same being a letter written by the defendant from the jail and confiscated by the jail authorities, thus violating the defendant's rights under the Constitution of the United States."

And appellant argues in his brief:

> "Thus, the reading and confiscation of the letter of the defendant herein violated his constitutional rights under the first and fourteenth amendments of the Constitution of the United States, was an illegal seizure of evidence, and therefore said evidence should have been excluded as fruits of a poisoned tree."

Appellant's fourth amendment claim, framed in terms of "an illegal seizure," is tenuous at best. Undoubtedly, there is a legitimate state interest in searching a prisoner's mail for contraband. So, too, the state may justify reading the correspondence to determine whether an escape attempt is impending. Appellant had notice of the jail policy requiring such inspection. The letter was written on stationery purchased from the jail commissary and bore the following printed statement:

> "All Inmates' mail is Inspected By Jail Personnel for contraband . . . All correspondence must be in English, otherwise, letters will not be delivered."

We assume, without deciding, that appellant consented to having his mail examined. Hence, the nub of appellant's claim appears to be that a lawful search which uncovers incriminating evidence unrelated to the purpose of the search becomes an illegal seizure of defendant's papers. The argument appears to be without merit. *See Harris v. United States* (1968), 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 [registration card discovered while police were "securing" impounded vehicle admissible]. It is pos-

sible that appellant seeks to assert no more than a general claim to privacy under the fourth amendment. In view of the admonition printed on the stationery upon which appellant wrote his letter, appellant would be hard pressed to show any justifiable expectation of privacy in the contents of his letter. *See Katz v. United States* (1967), 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576. We decide none of these possible fourth amendment arguments. No fourth amendment claim was presented at trial or in appellant's motion to correct errors, and we will not consider it on appeal. *Stephens v. State* (1973), Ind., 295 N.E.2d 622.

Appellant bases his first amendment argument on the recent decision of *Procunier v. Martinez* (1974), 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224. *Procunier* sets forth standards for determining whether prison rules re censorship of mail infringe, without adequate justification, expression protected by the first amendment. *Procunier* also affirmed that minimum procedural safeguards are required when letters are censored or delivery refused. *Procunier* was argued on December 3, 1973, the same day the jury returned its verdicts against appellant. Appellant was sentenced December 28, 1973. His motion to correct errors was overruled on March 29, 1974. *Procunier* was handed down April 29, 1974. Appellant's brief presents no first amendment attack upon any rule of the Allen County jail, but merely asserts an abridgement of his right to know that his letter would not be delivered and the reason for such interference. However, like the fourth amendment arguments, this first amendment claim is raised for the first time on appeal, and we will not consider it.

Appellant's objection at trial, premised upon the fifth, ninth and fourteenth amendments, but not elaborated upon in appellant's brief, appears to raise the same question

of infringement of the right to privacy argued on appeal under the first and fourth amendments but not presented to the trial court. Since the United States Constitution does not explicitly mention a right to privacy, each of these amendments has had various aspects of privacy ascribed to it. *See Roe v. Wade* (1973), 410 U.S. 113, 152-54, 93 S.Ct. 705, 726-727, 35 L.Ed. 147, 176-78. In the absence of further explication in appellant's brief of the objection presented at trial, we believe there was no unjustifiable infringement of appellant's right to privacy, as that right is grounded in the fifth, ninth and fourteenth amendments. The letter was properly admitted.

III.

Appellant urges that insufficient evidence of premeditation was presented to warrant his conviction of first degree murder in the death of Roger D. Hudson. Specifically, appellant asserts that the evidence is insufficient because the state's witness was not in the vehicle when the shooting took place and "in his [appellant's] drugged condition any number of rationales can be put forward to explain what happened in the car besides premeditated malice."

Premeditation, as the bench mark of first degree murder means "thought of beforehand" for some length of time however short. Perkins, in his treatise on Criminal Law notes at page 92 that "Those who first employed this word . . . undoubtedly had in mind a malicious scheme thought out well in advance of the fatal act itself." Ordinarily an appeal challenging sufficiency of the evidence of premeditation frames the question in terms of an asserted lack of time prior to the fatal act in which the deliberative thought could have taken place. *See e. g., McCurdy v. State* (1975), Ind., 324 N.E.2d 489. In that

situation, the applicable standard is found in *Everett v. State* (1935), 208 Ind. 145, 150, 195 N.E. 77, 79:

> "Where the homicide has been preceded by a concurrence of will, with an intention to kill, and these are followed by deliberate thought or premeditation, although they follow as instantaneous as successive thoughts can follow each other, the perpetrator may be guilty of murder in the first degree."

Appellant's objection to the finding of premeditation is apparently based upon a misconception that premeditation and intent *must* be "as instantaneous as successive thoughts." Here, the evidence before the jury more readily fits the classical conception of premeditation discussed by Perkins. Evidence of the decedent's alleged homosexual assault upon the appellant was before the jury, as was appellant's handwritten statement: "I couldn't get my mind off of it for two days so I thought acid would help me escape the thought of what happened. Now that man and another man are dead because I shot them." The jury also heard testimony that appellant asked his friend, Jack James, where James' gun was, shortly after appellant arranged to have the decedent drop by. The murder weapon was identified as belonging to Jack James.

It is a fundamental premise that we do not reweigh the evidence on appeal. Rather, we must ascertain whether there exists any substantial evidence of probative value from which the jury could have inferred appellant's guilt beyond a reasonable doubt. If such evidence exists, we must affirm. *King v. State* (1968), 249 Ind. 699, 234 N.E.2d 465. In this case sufficient evidence was presented from which the jury could conclude that appellant's killing of Roger Hudson was premeditated.

IV.

[11] Appellant assigns as error the overruling of his objection to certain language embodied in Instruction No. 4 on malice. That instruction reads:

> "Malice, in law, and as used in the statute defining murder, has a technical meaning, including not only anger, hatred or revenge, but every unlawful and unjustifiable motive. It is not confined to ill-will towards one or more individual persons, but is used and intended to denote an action growing from any wicked or corrupt motive—a thing done with bad or malicious intent—where the act has been attended by such circumstances as to carry in them the plain indication of a heart without regard for social duties, and fatally bent on mischief; and, therefore, malice may be implied from any deliberate and cruel act against another, however sudden."

Appellant's counsel made the following objection to this instruction:

> MR. FINK: "The defendant objects to the giving of State's Instruction Number 4 in the second sentence which states, 'It is not confined to ill-will towards one or more individual persons, but is used and intended to denote an action growing from any wicked and corrupt motive—a thing done with bad or malicious intent . . .' The defendant objects to the use of the words, 'A thing done with bad or malicious intent . . .' because it does not refer to an act, and in the case at hand with what the Jury and the Indictment is faced with is with killing. And, therefore, a reference to a 'thing', which does not reflect on the act of killing, makes the instruction incorrect and prejudicial to the rights of the defendant."

Undoubtedly, the word "thing" in the English language is often employed by a writer or speaker who lacks the ability to articulate his thoughts more precisely. The usage of the word "thing" in the context of Instruction No. 4, however, is not an example of imprecise usage. "Thing" is used as a noun synonymously with the word "action" in the same sentence. An acceptable definition of the word "thing" appearing in *The American College Dictionary* (Random House, 1958 ed.) is "6. an action, deed, or performance." Moreover, an instruction on malice virtually identical to this one—and containing the phrase "a thing done with bad or malicious intent"—was approved by this Court in *Harris v. State* (1900), 155 Ind. 265, 58 N.E. 75. There was no error in the overruling of appellant's objection to Instruction No. 4.

For all of the foregoing reasons, the judgment of the trial court is affirmed.

GIVAN, C. J., and ARTERBURN and PRENTICE, JJ., concur.
DEBRULER, J., concurs in result.

MEMORANDUM AND ORDER OF THE DISTRICT COURT

(Filed January 31, 1979)

No. S 78-229

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

ROBERT JOSEPH RENNERT,
Petitioner

v.

JACK RAYMOND DUCKWORTH, and THE ATTORNEY GENERAL OF THE STATE OF INDIANA,
Respondents

MEMORANDUM AND ORDER

The Grand Jury of Allen County, Indiana returned a two-count indictment against the Petitioner on January 18, 1973, charging him with one count of first degree murder and one count of second degree murder. The Petitioner filed a timely motion to dismiss and a plea in abatement, both of which were denied on August 7, 1973. Prior to trial, the Petitioner filed a motion to suppress certain oral and written statements. The motion was granted as to the oral statement but denied as to the written statement. The Petitioner entered pleas of not guilty and trial commenced on November 28, 1973. On December 3, 1973, the jury returned verdicts of guilty as charged in both counts of the indictment. On December 28, 1973, the trial court rendered judgment in accordance with the verdict, and imposed a life sentence upon Petitioner as

to the first count, concurrent with a fifteen (15) to twenty-five (25) year term as to the second count, to be served in the Indiana State Prison. On February 22, 1974 a Motion to Correct Errors was filed, and subsequently denied.

The Indiana Supreme Court heard the Petitioner's appeal and affirmed the conviction on June 19, 1975. The opinion is published at 263 Ind. 274, 329 N.E. 2d 595 (1975). Both of the issues raised in this Petition for Habeas Corpus were raised in the lower court and on appeal. The Supreme Court of Indiana decided the issues adverse to the Petitioner.

This action is filed under 28 U.S.C. § 2254.

This petition alleges two defects in pre-trial procedure, both of which were raised on the direct appeal to the Supreme Court of Indiana. The petition does not dispute the factual statements found in the opinion of the Supreme Court of Indiana. The state transcript has been filed here and has been carefully examined by this Court.

Petitioner alleges that when a co-suspect was called by the grand jury, the 18 year old co-suspect's parents and attorney were present. The opinion reports that the trial court denied petitioner's motion to dismiss and plea in abatement for that reason and explains that there was a stipulation that the other suspect's parents "took no part in the proceedings but that his attorney was permitted to cross-examine him." The petition *sub judice* notes that petitioner was not accorded a similar privilege, but both the petition and the opinion are silent as to whether he requested the same.

The petition alleges no actual prejudice resulting from the above circumstance and in his appeal none was demonstrated. No such prejudice has been demonstrated here.

The petition states that before being indicted petitioner, as a prisoner in jail, placed a letter in an unsealed envelope and sent it for delivery, and that an officer in the jail opened it and read it without permission of petitioner. Incriminating statements in the letter were introduced at trial over petitioner's objection. The letter was not delivered, but was confiscated by the jail authorities.

Reference to the transcript and opinion adds these facts: The letter was apparently intended as a letter to the editor of the Defiance Crescent News, Defiance, Ohio. That there was a written jail policy of inspecting outgoing mail; and that the jail commissary stationery used on the letter in question included a printed notice that all inmates mail is inspected.

A copy of said letter, dated January 9, 1973, is attached hereto and incorporated herein as Appendix A.

All of the issues in regard to this letter were given a full and fair hearing under *Stone v. Powell,* 428 U.S. 465 (1976).

This action is brought in federal habeas corpus under 28 U.S.C. §2254. Therefore the only ground available for maintenance of the action is that the petitioner allege custody in violation of the constitution, laws or treaty of the United States. He alleges violation of the Fifth and Fourteenth Amendments in the Grand Jury matter; and of the First, Sixth, Ninth, and Fourteenth in the letter-interception question. Habeas corpus exists only to test the legality of confinement, and not to redress any alleged civil rights deprivations not related to the confinement. *Townsend v. Sain,* 371 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963); *Hill v. Johnson,* 539 F.2d 439 (5th Cir. 1976).

Normally, third parties are not permitted to enter the Grand Jury room with prospective witnesses, even

with suspects. Indeed, were this a Federal trial, this circumstance might have been a violation *per se* of the Fifth Amendment right to a grand jury. Prejudice would simply assumed. But this was a state action.

It has been held often that there is no federal constitutional right to an indictment by grand jury in a state action. *Freeman v. Page*, 443 F.2d 493 (10th Cir., 1971), cert. denied, 704 U.S. 1001, 92 S.Ct. 569, 30 L.Ed.2d 554, rehearing denied 406 U.S. 963, 92 S.Ct. 2064, 32 L.Ed. 351. Allegation that a state indictment is defective is not grounds for a federal habeas corpus. *U.S. v. Budd v. Maroney*, 398 F.2d 806 (3rd Cir. 1968). In a collateral attack upon a state conviction for an allegedly unconstitutional grand jury indictment the petitioner in a federal proceeding must show actual prejudice. *Francis v. Henderson*, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976). The review on habeas corpus is essentially whether the indictment is so fatally defective that in no circumstances could a valid conviction be obtained from the facts provable under the indictment. *Johnson v. Beto*, 383 F.2d 197 (5th Cir. 1967), cert. denied 393 U.S. 868, 89 S.Ct. 153, 21 L.Ed.2d 136, rehearing denied 393 U.S. 992, 89 S.Ct. 455, 21 L.Ed.2d 458.

Indiana does not require a grand jury indictment for any crime. When Indiana resorts to a grand jury, it will allow an attack on its proceedings only on proof of actual prejudice. For examples, see *Williams v. State*, 188 Ind. 283, 123 N.E. 209 (1919); *Jordon v. State*, 255 Ind. 114, 262 N.E.2d 851 (1970).

Indiana has historically ruled that the presence of a stranger in the grand jury room does not yield "any advantage" to the person indicted, *Shattuck v. State*, 11 Ind. 473, and such an occurrence is not sufficient to abate

an indictment "unless it appears that the person indicted was thereby injured in his substantial rights"; *State v. Bates*, 148 Ind. 610, 48 N.E. 2 (1897).

Federal law gives Indiana defendants no greater rights regarding grand jury secrecy and other grand jury irregularities; it takes a showing of actual prejudice to attack the grand jury. Petitioner has alleged nothing in the way of actual prejudice.

Therefore, he has alleged no infringement of any right protected by the U.S. Constitution. To the extent that there is an equal protection allegation that there was discrimination in preventing petitioner from having third persons with him in the grand jury room, this could be the subject of a different remedy, not habeas corpus.

Accordingly, no relief should be granted on this allegation of the petition.

Here petitioner evidently was injured by the use of the letter in evidence and the question is whether the obtaining of it was unconstitutionally improper.

To be unconstitutional, a search must be unreasonable. In a penalogical setting, certain infringements of constitutional rights are allowed. In the case of correspondence, these are justified by the state interest in preventing traffic in contraband and determining if an escape is being planned. It was for that reason that the jail in this case announced that all mail was to be inspected, and all correspondence must be in English.[1]

The inspection in this case occurred before indictment. By coincidence the indictment was handed down the same day as the U.S. Supreme Court opinion in

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1. Petitioner does not allege ethnic discrimination in restricting him to a particular language; there is no allegation that English is not his first tongue.

Procunier v. Martinez, 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 244 (1974), which laid down standards to determine whether regulations or procedures relating to prison inmates' correspondence were permissible as restraints on First Amendment freedoms of expression. In brief, these standards were that

—the procedure further an important governmental interest,

—the interest be unrelated to suppression of expression, and

—the limitation be no greater than what is necessary to protect the interest.

A prison administration need not prove that a failure to censor a particular letter would definitely create adverse circumstances; it is only necessary to show a general necessity of maintaining the regulation or practice.

The reasoning in *Procunier v. Martinez* that permits inspection of prisoner mail for contraband, proposed criminal activity, or escape plans indisputably applies equally well to county jail prisoners.

Clearly, jail officials were entitled to look at petitioner's mail for those purposes.

Moreover, it is undisputed that petitioner had actual knowledge, by adequate notice, that his letters would be inspected for contraband and must be in English. Surely the former constituted a warning that the letter would be opened, and the language requirement meant that the jailors would check the letters for content, as well.

In light of the admonition printed on the stationery, it is difficult to see how petitioner could justifiably expect privacy in the contents of his letter. E.g. *Katz v. U.S.,* 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967).

Furthermore, by the undisputed fact that petitioner handed his jailors an *unsealed* letter, it is most reasonable to assume that he consented to a search, for such purposes, at best.

Therefore, it must be concluded that the jail officials conducted a lawful search of the mailed item. It only remains to determine whether the incriminating evidence unrelated to the purpose of a search can be used at trial.

It is well-settled in analogous cases that such evidence can be used at trial. For instance, evidence found in "inventory searches" of properly impounded automobiles is admissible. E.g. *Harris v. U.S.,* 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968).

Here, the routine inspection of the piece of mail itself is equivalent to the "inventory search". The unrelated evidence—incriminating statements—turned up in that proper search. It should be admissible (it should be kept in mind that, as parts of a letter to the editor, the statements were evidently intended by their author to be a public utterance).

There remains only one aspect of this issue undiscussed: that jail officials did not mail the letter, but kept it, thereby interfering with the self-expression of petitioner.

However, this is not the subject of a habeas corpus. That is, at best, an allegation of an infringement of a First and Fourteenth Amendment violation unrelated to the underlying conviction. As such, it may be cognizable in another action, but not one in habeas corpus.

A facial examination of this letter, now Appendix A, indicates clearly that it is in the category of a free and voluntary statement made without any coercion. There is nothing in this entire record to indicate otherwise.

The letter was intended by the writer, this petitioner, for widespread dissimination. It, in fact, got less dissimination than was obviously desired. If it had, in fact, been published in a newspaper, it could have been used as evidence against this petitioner. There was certainly no expectation of privacy, a point well stated by Justice Hunter at 329 N.E.2d 599. For relevant federal authority see *Hoffa v. U.S.*, 875 S.Ct. 408 (1966), and *U.S. v. Cook*, 530 F.2d 145 (7th Cir. 1976). In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court of the United States stated such voluntary statements not in response to police interrogation are admissible despite the absence of a knowing and intelligent waiver of the Fifth Amendment privilege.

Therefore, the petition is DENIED.
Enter January 31, 1979.

/s/ ALLEN SHARP
Judge, United States District Court

Letter Written by Robert Joseph Rennert

Jan. 9, 1973

Dear Society:

I, Robert Joseph Rennert, have committed a crime against you. I must answer to you and God for this. God knows why I sinned but I'll have to explain to the best of my knowledge to society as to why I killed two human beings. To do this I'll have to explain what makes me tick. I come from a wonderful family. I never really appreciated this family. All the love and understanding they tried to give me I threw out of my life because I thought they tried to force things on me. I love to write music and play guitar and I wanted to make that my life.

I didn't want to go to college because in order to do something better than anyone else you must devote your life to that one thing. I don't mean you can't do things other people do but I just couldn't see where college could help me write about life. This my parents couldn't understand. I don't blame them for this. They were brought up in a world of little [socializing] except for family and close friends. Now there is all different types of cultures; one which I will talk about, the Drug Culture. I got myself into this after football my junior year. I say got myself into it because even though it was offered to me by many good friends I still had the freedom of choice. Anyone who has tried drugs or is on drugs or who is thinking about trying drugs is mainly who I am talking to. I hope I can change just one person's mind who will carry on my works and try to get people away from drugs. Let me explain why I am down on drugs. Anyone who knows me [knows] I've done dope and I've sold drugs. I thought just like anyone else who has done drugs. That they are nice unharmful things. Why shouldn't they be allowed, it's a free country. Why shouldn't we be allowed to take something that's not harming anyone. Sure heroins bad but that's different Right? Wrong! Anyone who knows me knows I am not a violent person. I love life and life is people. Now let me tell you why drugs have no part in life. When I was in sixth grade I was hitchhiking and was picked up by a homosexual and was molested. I was too young to fight but it always stuck with me in the back of my mind. Saturday, Dec. 30, 1972 I relived that experience only this time in a house where I was too drugged to fight. I couldn't get my mind off of it for two days so I thought acid would help me escape the thought of what happened. Now that man and another man are dead because I shot them. I am a person who has no record of violence but who turned

killer in a minute. I had no knowledge as to what I was doing I just did it because drugs turned on me and made me lose my mind for eight hours. Now I have the rest of my life to realize what a terrible thing I did. Don't let drugs turn on you. Do yourself and society a favor. Quit.

/s/ Robert Joseph Rennert Jan. 9, 1973

JAIL REGULATIONS

All letters must have a return address on the envelope. Please write as plainly as possible. All Inmates' mail is Inspected by Jail Personnel for contraband. Inmates may write three (3) letters each week, consisting of not more than one and one-half pages on one sheet of paper, which will be purchased from the Jail Commissary. Souvenir Postals, Cards of Greeting, Announcements, Newspapers, Newspaper Clippings will not be delivered. All correspondence must be in English, otherwise, letters will not be delivered. Inmates may receive money orders or certified checks - do not send cash. Cash may be left for inmates during visiting. Stamped envelopes, cigarettes, candy, and other items may be purchased by the inmates from the Jail Commissary. VISITING HOURS: WEDNESDAY and SUNDAY from 1:30 to 2:30 P.M. IMMEDIATE FAMILY ONLY.

JAIL BREAKING

Acts 1935, Chapter 96. Effective February 27, 1935

Any person being lawfully confined in any County Jail or in any other Prison of this State awaiting trial upon any criminal prosecution who SHALL ESCAPE THEREFROM, OR FROM THE CUSTODY OF THE OFFICER LAWFULLY IN CHARGE OF such person, shall be

deemed guilty of JAIL BREAKING and on conviction therefor, shall be

(1) imprisoned in the State Prison for not less than one (1) year or not more than five (5) years, and fined in any sum not exceeding $500.00,

(or)

(2) imprisoned in the County Jail or State Penal Farm for any determined period not exceeding one (1) year and fined in any sum not exceeding $500.00.

If any person shall be convicted of the commission of a felony for which he was imprisoned or in custody at the time of his escape, any penalty imposed under the provisions of this act shall be in ADDITION TO THE PENALTY imposed for the commission of such other felony and shall not run concurrently therewith.

UNPUBLISHED PER CURIAM ORDER OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

(Dated February 1, 1980)

No. 79-1702

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Before
HON. THOMAS E. FAIRCHILD, *Chief Judge*
HON. WILLIAM J. BAUER, *Circuit Judge*
HON. HARLINGTON WOOD, JR., *Circuit Judge*

ROBERT JOSEPH RENNERT,
Petitioner-Appellant,

vs.

JACK RAYMOND DUCKWORTH, Warden,
Indiana State Prison,
Respondent-Appellee.

Appeal From the United States District Court for the Northern District of Indiana, South Bend Division, No. S 78-C-229
Allen Sharp, JUDGE

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, South Bend Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the order of this court entered this date.

UNPUBLISHED ORDER OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

(Dated February 1, 1980)

[UNPUBLISHED ORDER NOT TO BE CITED PER CIRCUIT RULE 35]

No. 79-1702

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

HON. THOMAS E. FAIRCHILD, *Chief Judge*
HON. WILLIAM J. BAUER, *Circuit Judge*
HARLINGTON WOOD, JR., *Circuit Judge*

ROBERT JOSEPH RENNERT,
Petitioner-Appellant,

vs.

JACK RAYMOND DUCKWORTH, Warden,
Indiana State Prison,
Respondent-Appellee.

Appeal From the United States District Court for the Northern District of Indiana, South Bend Division, No. S 78-C-229
Allen Sharp, *Judge*

ORDER

Petitioner was indicted and found guilty in an Indiana state court of the murder of two persons in 1973 and was

sentenced to the state penitentiary where he remains.[1] In his petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 petitioner alleges two constitutional violations.

First, petitioner argues that his Fifth and Fourteenth Amendment rights were violated by the grand jury procedure used to indict him. An eighteen year old co-suspect was called before the grand jury accompanied by his parents and his attorney. It does not appear that petitioner sought or was accorded a similar privilege.

It is recognized that the presence of unauthorized persons before a federal grand jury would be governed by Rule 6(d), Federal Rules of Criminal Procedure, authorizing only attorneys for the government, witness under examination, interpreter of a witness, and a court reporter to be present except during deliberations or voting when they are excluded. The presence of an unauthorized person before a federal grand jury has been often held as ground per se for voiding an indictment without any necessity of proof of actual malice. *See, e.g., United States v. Phillips Petroleum Co.*, 435 F.Supp. 610, 618 (N.D. Okla. 1977); *United States v. Braniff Airways, Inc.*, 428 F.Supp. 579, 582-83 (W.D. Tex. 1977); *United States v. Isaacs*, 347 F.Supp. 743, 748-49 (N.D. Ill. 1972). Petitioner seeks to have us impose a similar rule on state grand jury proceedings.

Although it is not so in all states,[2] Indiana long ago determined that the presence of an unauthorized person in the grand jury room during the investigation of a

1. Petitioner's direct appeal to the Indiana Supreme Court resulted in an affirmance of his conviction. *Rennert v. State*, 263 Ind. 274, 329 N.E.2d 595 (1975).

2. For example see *Rudd v. State ex rel. Christian*, 310 So.2d 295, 298-99 (Fla. 1975); *State v. Hansen*, 215 N.W.2d 249, 252 (Iowa 1974).

criminal charge is not sufficient to void an indictment unless it can be shown the person ultimately indicted was prejudiced or injured in his substantial rights. The Indiana cases so holding are reviewed in the direct appeal of this case. *Rennert v. State*, 263 Ind. at 275-76, 329 N.E.2d at 596-97. Petitioner has been unable to demonstrate any actual prejudice, arguing that it is virtually impossible. It may at times be difficult, but in the circumstances of this case it would not necessarily have been impossible to demonstrate had prejudice actually occurred. We are not advised of any effort that was made by petitioner to demonstrate prejudice. Petitioner only argues prejudice and asks us to assume prejudice. That petitioner was indicted and the co-suspect was not is not sufficient by itself to show prejudice. The co-suspect's lawyer interrogated the co-suspect, but the parents of the co-suspect although present, did not otherwise participate.

Petitioner refers us to *Peters v. Kiff*, 407 U.S. 493 (1972), holding that the systematic exclusion of any race from a defendant's grand or petit jury is a denial of due process. That type of exclusion was deemed to have an impact too subtle and too pervasive to adduce. We do not believe that petitioner's complaint brings him within the rationale of race discrimination cases. In *Peters* it was held that if a state chooses, apart from constitutional compulsion to use the grand jury procedure, due process imposes limitations on the composition of that jury. 407 U.S. at 501. However, it has never been held that the federal concepts of grand jury procedure binding on federal courts under the Fifth Amendment are obligatory for the states. *Alexander v. Louisiana*, 405 U.S. 625, 633 (1972).

We may prefer the federal rule but we are not prepared to impose it on a state as a constitutional require-

ment. No claim is made that any unauthorized person was present in the grand jury room during the deliberations or voting. Further petitioner has not shown that he sought the same privilege of having his lawyer or family appear with him before the grand jury and was refused. We cannot determine whether petitioner was denied equal treatment or not. We find no federal constitutional error.

Secondly, while in custody awaiting grand jury action the petitioner wrote a letter to the editor of his home town newspaper, placed it in an unsealed envelope and delivered it to jail authorities for inspection for contraband and mailing. After a jail official read the letter without permission of petitioner and noted incriminating statements about the two murders the letter was confiscated. When the letter was offered by the state at trial petitioner's counsel objected only on the basis of violations of the Ninth, Fourteenth and Fifth Amendments of the Constitution of the United States. No mention was made of the Fourth Amendment until the case reached the Indiana Supreme Court, which then declined to consider the issue raised for the first time before it.

Both the Indiana Supreme Court and the District Court concluded that it appeared that petitioner by sending the letter to his home town newspaper editor with the salutation "Dear Society" intended that the contents of the letter be published. The letter was in the nature of an essay about the evil effects of drugs and a warning to all that one who uses drugs might end up in as much trouble as petitioner. Petitioner objects to that view as petitioner did not testify and there was no evidentiary explanation for the letter. Even if we assume that the jail authorities went beyond the propriety of a search

for contraband, no more evidentiary explanation is needed than the letter itself which was admitted into evidence. The inference to be drawn from the letter is clear and unmistakable. There is no basis to suppose that petitioner had any expectation of privacy for the letter, but to the contrary intended it be published in the newspaper. It was a "letter to the editor."

The petitioner failed to take advantage of the full and fair opportunity accorded in Indiana for consideration of his Fourth Amendment claim. Not only did he not raise a Fourth Amendment claim during his state trial but he also failed to raise it in his post trial motions. Petitioner's own failures do not convert the issue into one for federal habeas corpus relief. *United States ex rel. Maxey v. Morris,* 591 F.2d 386 (7th Cir. 1979). The issue is resolved against petitioner by *Stone v. Powell,* 428 U.S. 465 (1976).

Petitioner also objects to the confiscation of the letter under the First, Ninth and Fourteenth Amendments. The First Amendment claim was also raised for the first time on appeal in the state court. Petitioner in this court concentrates his argument on the First Amendment assurance of the right to send and receive mail. *Blount v. Rizzi,* 400 U.S. 410 (1971). The mail rights of inmates and the distinctions between mail restrictions on pretrial detainees and on those who have already been convicted are beside the point in this habeas corpus proceeding. We are concerned only with constitutionally unlawful imprisonment and not with the redress of possible civil rights violations. In the context of this case we find no merit to petitioner's allegations of constitutional violations which at most have only a collateral relationship to his confinement. Petitioner sought public expression of his views, but those views became public in a way he had not anticipated. Had his letter been published, as there is ample

reason to believe was his intention, even a timely Fourth Amendment claim would have been to no avail.[3]

Affirmed.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

First Amendment, United States Constitution:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment, Section 1, United States Constitution:

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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3. Defendant sought the dismissal of this appeal for failure to include in petitioner's brief a jurisdictional statement as required by Rule 9(b) of our own rules and also a statement of issues as required by Rule 28(a)(4), Federal Rules of Appellate Procedure. Those missing features did not hamper the consideration of the merits of this case and do not justify dismissal of the appeal on those grounds.

Burns, Ind. Stat. 35-1-15-10:

Clerk-stenographer, oath. - The grand jury must select one of its number as clerk, who must take minutes of the proceedings, except the votes of the individual members on the finding of an indictment, and also of the evidence given before the grand jury, which shall be preserved for the use of prosecuting attorney: Provided, however, that such grand jury may by unanimous vote and the consent of the court employ a stenographer at not to exceed fifteen dollars ($15.00) per day, to take the minutes and evidence under the supervision of such grand jury and the clerk selected by it. Such stenographer before entering upon his or her duties shall subscribe to an oath, to be administered by the clerk of such court, that he or she will in no way reveal any of the proceedings had before such grand jury. (Acts 1905, ch. 169, §96, p. 584; 1963, ch. 124, §1, p. 111.)

Burns, Ind. Stat. 35-1-15-23:

Prosecutor's present. - The prosecuting attorney or his deputy shall be allowed at all times to appear before the grand jury, for the purpose of giving information relative to any matter cognizable by it, or advice upon any legal matter when required; and he may interrogate witnesses before the grand jury, when the jury or he deem it necessary, but no prosecuting attorney, officer or person shall be present with the grand jury during the expression of their opinions or in giving their votes upon any matter before them. (Acts 1905, ch. 169, §109, p. 584).

Burns, Ind. Stat. 35-1-16-1:

Indictment - How found. - At least five (5) of the grand jurors must concur in the finding of an indictment; and when so found it must be signed by the prosecuting

attorney; and it must also be indorsed by the foreman of the grand jury, "A true bill," and he must subscribe his name thereon as foreman. (Acts 1905, ch. 169, §110, p. 584.)

Rule 6(d), Federal Rules of Criminal Procedure:

Who May Be Present. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.